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IN THE

# Supreme Court of the United States

**October Term, 1960.**

**No. 50.**

EASTERN RAILROAD PRESIDENTS CONFERENCE, et al.,

*Petitioners,*

*v.*

NOERR MOTOR FREIGHT, INC., et al.,

*Respondents.*

**On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.**

## SUPPLEMENTAL BRIEF FOR RESPONDENTS FILED PURSUANT TO RULE 41(5).

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It has been argued by petitioners that the sovereign power of the state to legislate, and their right to seek legislation, insulates them completely from liability under the antitrust laws, despite their intent, in combination, to achieve a monopoly. Of course, as stated in our brief, petitioners' argument ignores the fact that the legislative activity was only one of many means used by petitioners to achieve the monopoly.

Moreover, this argument parallels that of the City of Tuskegee, that the sovereign state legislative control over municipal boundaries and election districting is immune from constitutional and judicial control, an argument which was rejected this past Monday, November 14, 1960, in *Gomillion, et al. v. Lightfoot, et al.*, October Term, 1960, No. 32, 29 L. W. 4024.

In that case, this Court, in an opinion by Mr. Justice Frankfurter, stated: ". . . 'Acts generally lawful may become unlawful when done to accomplish an unlawful end, *United States v. Reading Co.*, 226 U. S. 324, 357' . . ." The *Reading* case cited was an antitrust case involving railroads, and this principle is illustrated by many other antitrust decisions including: *Northern Securities Co. v. United States*, 193 U. S. 197, 343-50; *United States v. Sisal Sales Corporation*, 274 U. S. 278; *United States of America v. Borden Co., et al.*, 308 U. S. 188, 204-5; *Union Pacific Railroad Company v. United States*, 313 U. S. 450, 465-7; *United States v. South-Eastern Underwriters Assn., et al.*, 322 U. S. 533, 553-62; *Georgia v. Pennsylvania R. Co.*, 324 U. S. 439, 454-62; *United States v. Radio Corp. of America*, 358 U. S. 334, 346-7, 353; See also Brief for Respondents, at pp. 16-18.

And the reason for this rule is even stronger here than in *Gomillion* since respondents here do not seek to invalidate the state legislation,[1] but only to recover from and enjoin the private parties who sought to procure it as one part of their conspiracy to monopolize.

The Court in the *Gomillion* case set forth further the principle which guides the judicial consideration of such controversies: "Particularly in dealing with claims under broad provisions of the Constitution, which derive content by an interpretive process of inclusion and exclusion, it is imperative that generalizations, based on and qualified by the concrete situations that gave rise to them, must not be applied out of context in disregard of variant controlling facts. . . ."

The Court's admonition, that "sophisticated as well as simple-minded modes of discrimination" are forbidden, applies equally to sophisticated conspiracies to monopolize, as the trial court concluded with regard to the conspiracy here (R. 48, 110).

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1. See *Bibb v. Navajo Freight Lines*, 359 U. S. 520, 526-7, 529-30.

The Court also noted that the Tuskegee argument "would sanction the achievement by a State of any impairment of voting rights whatever so long as it was cloaked in the garb of the realignment of political subdivisions". Here, too, the argument of petitioners would sanction the achievement of any monopoly whatsoever so long as it was cloaked in the garb of legislation. But, as the cases cited above show, the Court has again and again declared the achievement of a monopolistic purpose through governmental action does not insulate the private parties who have sought such action from responsibility for violation of the antitrust laws.

Respectfully submitted,

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